

FEDERAL MAGISTRATES COURT OF AUSTRALIA

PHAM v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 827

MIGRATION – Spouse visa – whether failure to take into account relevant witness statements – whether statements posted and/or received by Tribunal before decision – obligation to consider material – jurisdictional error – Regulation 1.15A(3) – whether relevant evidence ignored – whether necessary to make finding of claims regarding domestic violence where adverse finding made in relation to genuine spousal relationship – application allowed.

Migration Regulations 1994

Acts Interpretation Act 1901, s.29

Evidence Act 1995 (Cth), s.160

Migration Act 1958, ss.357A, 359A, 362A, 375, 375A, 376

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] HCA 63

Lay Lat v Minister for Immigration and Multicultural Affairs [2006] FCAFC 61

SZCIJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 62

Antipova v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] FCA 584

Bretag v Immigration Review Tribunal (Unreported Federal Court per
O’Loughlin J 29 November 1991)

Collins v Minister for Immigration [2003] FMCA 571

Zaouk v Minister for Immigration & Anor [2006] FMCA

Minister for Immigration & Citizenship v Zaouk [2007] FCAFC 47

Serfonteyn v Minister for Immigration [2004] FMCA 333

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82

Du v Minister for Immigration and Multicultural and Indigenous Affairs [2000]
FCA 1115

Rith Sok v Minister for Immigration and Multicultural and Indigenous Affairs
[2004] FCA 1235

Applicant VEAL of 2002 v MIMA [2005] HCA 72 (6 December 2005)

*Minister for Immigration and Multicultural and Indigenous Affairs Ex parte
Lamb* (2003) 214 CLR 1

Applicant: DIEU BAO TRAM PHAM

First Respondent: MINISTER FOR IMMIGRATION &
CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: PEG 287 of 2005

Judgment of: McInnis FM

Hearing date: 2 August 2006

Date of last submission: 24 January 2007

Delivered at: Melbourne (and by video link to Perth)

Delivered on: 31 May 2007

REPRESENTATION

Counsel for the Applicant: Mr R.E. Lindsay

Solicitors for the Applicant: Wojtowicz Kelly Legal

Counsel for the First Respondent: Mr J. Allanson

Solicitors for the First Respondent: Australian Government Solicitor

ORDERS

- (1) The name of the First Respondent be changed to “Minister for Immigration and Citizenship”.
- (2) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 24 November 2005.
- (3) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.
- (4) Costs reserved.

- (5) Liberty to apply is granted to the parties in relation to the issue of costs within 7 days of the date of these orders.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
PERTH**

PEG 287 of 2005

DIEU BAO TRAM PHAM
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant seeks judicial review of a decision of the Migration Review Tribunal (the Tribunal) dated 24 November 2005.
2. In its decision the Tribunal affirmed a decision of a delegate of the First Respondent finding that the Applicant was not entitled to the grant of a Subclass 820 (Spouse) visa.
3. Ultimately, the Applicant relies upon a "Re-Amended" application dated 31 July 2006. Both parties have otherwise relied upon submissions made at a hearing before the court and written contentions provided prior to and after that hearing. Both parties also sought to rely upon affidavit evidence.
4. The Applicant sought to rely upon the following:

Affidavit of Applicant sworn 31 March 2006 (Exhibit A1).

Affidavit of Christina Marie Chang sworn 4 April 2006 (Exhibit A2).

Affidavit of Applicant sworn 1 August 2006 (Exhibit A3).

Affidavit of Huynh Anh Ngo sworn 1 August 2006 (Exhibit A4).

Affidavit of Helen Monika Kadner sworn 1 August 2006 (Exhibit A5).

Affidavit of Christina Marie Chang sworn 1 August 2006 (Exhibit A6).

5. The First Respondent sought to rely upon the following affidavits:

Affidavit of Peter John Corbould sworn 22 March 2006 (Exhibit R1).

Affidavit of Victoria Coleman affirmed 31 July 2006 (Exhibit R2).

Affidavit of Hilary Lovibond affirmed 31 July 2006 (Exhibit R3).

6. A number of objections were taken to the affidavits by the First Respondent which were relied upon by the Applicant. Many of the paragraphs which were the subject of objection clearly raised argument and/or submissions and were not properly part of affidavits. To the extent that objection of that nature was taken the court will disregard these parts of the affidavits. Where objections were upheld and paragraphs in affidavits excluded, then if it is relevant to do so I shall refer to only those parts of the affidavit which were not subject to successful objection. It was made clear to the parties that simply by receiving the affidavits, it did not mean that the court regarded each paragraph as relevant to the court's task or indeed that the court should in any way rely upon the affidavit material. Again it is more convenient for the court to consider whether it will rely upon the affidavit material and have regard to that material subject to relevance and any objections which were noted and upheld.
7. At the outset the court made a ruling that the hearing proceed as a final hearing, rather than a show cause hearing. The parties agreed with that course.
8. Due to the late filing of the re-amended grounds of application the First Respondent was granted leave to file and serve further submissions.

Ultimately both parties relied on certain submissions which tended to prolong this proceeding. The Applicant relied upon an outline of submissions filed 29 March 2006, outline of supplementary submissions filed 31 July 2006, further supplementary submissions filed 23 August 2006 and a response by the Applicant to the First Respondent's further submissions (dated 28 August 2006) filed 5 September 2006. The Applicant further relied upon correspondence to the court dated 15 January 2007 enclosing the High Court decision in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 (SZBEL).

9. The First Respondent relied upon submissions filed 28 March 2006, supplementary submissions filed 3 April 2006, further submissions filed 9 August 2006 and submissions filed 24 January 2007.

Background

10. The Applicant is a Vietnamese national born on 7 July 1974. She arrived in Australia on a temporary visa on 7 December 1997.
11. On 16 February 1998 the Applicant married an Australian citizen Mr Lee Burton (Mr Burton). After they married the Applicant and Mr Burton lived in Queensland. Initially the Applicant's application for a spouse visa was supported by Mr Burton and other evidence was provided including photographs of the couple taken on their wedding day.
12. On 13 January 2000, the First Respondent's Department received a letter from Mr Burton where in part he states:

“... I’m wanting an extention on my wifes temporary visa, reason being we are having a few problems at present, and if Pham gets a permanent visa I am worried about my house and property.

When Pham arrived in Australia she moved into my house as a boarder and we hit it off we were married 3 months later and I’m worried she may not be genuine in loving me. We plan to travel to her country to see her family in September October so maybe I can understand her more. Basically I need more time to make sure Pham is not using me to stay in the country & as I have already said my house and property.” (sic)

(Court Book p.91)

13. According to the Tribunal decision the Applicant claimed to have met Mr Burton at a Christmas function and a relationship developed between them thereafter.
14. In its decision the Tribunal refers to a further letter dated 25 May 2000 where Mr Burton claims the Applicant had a boyfriend and was only home one or two days a week. The letter claimed that when Mr Burton approached the Applicant for a divorce she allegedly stated she wanted to stay married until she obtained permanent residence. Although a copy of the letter appears in the Court Book (pp.92-93) it has not been photocopied correctly and further details cannot be ascertained and hence I relied upon the Tribunal's brief summary of the letter.
15. By letter dated 7 June 2000 (Court Book p.104) Mr Burton's solicitors advised the First Respondent's Department that they act on behalf of Mr Burton and relevantly state:

“We are instructed that Mrs Tram Pham used our client for the purpose of gaining residence in Australia. Our client has submitted to you various evidence including 3 letters setting out the circumstances, forwarded copy of advertisement by Mrs Tram Pham seeking friends in Australia and responses from her various boyfriends.

We are instructed that Mrs Tram Pham now resides with Mr Huynh Anh Ngo born 5 February 1975. We understand that our client has submitted to you the car registration of Mr Huynh Anh Ngo which is a Honda Civic ... The car is used by Mr Ngo but is registered in his friend's name. Mr Ngo's driver's licence number is ... Our client advises that Mrs Pham recently resided with Mr Ngo at ... Inala (Mr Ngo's family home).”

16. The letter further refers to what is described as the current residence for the Applicant and Mr Ngo. The author then concludes:

“Our client no longer supports Mrs Pham's application for permanent residence and we ask that you cancel her application for permanent residence.”

17. One of the statutory declarations in support of the application had been declared by Mr Billy Hong on 31 March 1998 (Court Book pp.32-33). According to a Departmental file note (Court Book pp.94-96) Mr Hong

attended the Department to withdraw his support for the Applicant. The file note specifically states:

“He said he wanted to say that he felt Mrs Pham was using Australia's immigration system in a bad way. The relationship was over between Mrs Pham and Mr Burton, and Mrs Pham was doing anything she could to stay in Australia.”

18. On 26 June 2000 the Department wrote to the Applicant advising that information had been received about her relationship with the nominator (Court Book pp.106-113). The Department letter relevantly states:

“This Department has received information that you are not living in a genuine and continuing relationship with your nominating spouse, Mr Lee Burton.

Under migration legislation, there are three (3) circumstances in which an applicant may continue to be considered for the grant of a temporary and/or permanent visa on spouse grounds despite the fact that the relationship has ended. These are where:

- 1. the Australian citizen or permanent resident spouse has died;
or*
- 2. you are eligible for the grant of permanent residence under the domestic violence provisions (leaflet enclosed), or*
- 3. you and your nominating spouse have certain shared rights and obligations in respect of a child granted by a court.*

These three provisions exist where an applicant is able to establish that they are in a genuine and continuing spouse relationship with their nominator prior to the relationship ending.”

19. The Department then requested that the Applicant provide certain documents to the Department. The letter then provides:

“Firstly, you are required to provide evidence that you and Mr Burton were in a genuine and continuing spouse relationship prior to your relationship ending. This evidence should cover shared financial, domestic, social and emotional aspects to your relationship. I have enclosed a list of suggested examples of suitable types of evidence. This list is not exhaustive and it is

open to you to provide any evidence you believe supports your case.”

20. On 26 July 2000 Ms Ema Flynn de Garcia (Ms de Garcia) who describes herself as an "Ethnic Resource Supervisor" (Court Book p.119) wrote to the Department on behalf of the Applicant relevantly stating:

“We are writing on behalf of Mrs Pham Dieu Bao Tram a client of this service due to domestic violence. Ms Pham has been evicted from her home in Queensland by her husband and had come to live with her aunt for financial and emotional support.

Ms Pham will be applying for permanent residence under the Domestic Violence Provisions DVP. Supporting documentation will be forwarded as soon as possible.”

21. By a letter dated 30 August 2000 with enclosures (Court Book pp.123-141) the Applicant's migration agent provided detailed submissions to the Department. The enclosures included what are regarded as significant statutory declarations as follows:

a statutory declaration declared by the applicant on 21 August 2000 which named Mr Burton as the person who committed domestic violence against her;

a statutory declaration declared on 18 August 2000 by Ms de Garcia stating that in her opinion and review the applicant had suffered domestic violence perpetrated by Mr Burton;

a statutory declaration declared on 24 August 2000 by Dr Dang L. Sang a registered psychologist with the Psychologists Board of Western Australia and a lecturer of the University of Western Australia stated that in his opinion the applicant had suffered domestic violence perpetrated by Mr Burton.

22. It is perhaps useful to note that Ms de Garcia in her declaration (Court Book p.135) described in detail the nature of the violence allegedly experienced and set out Ms de Garcia's past experience claimed to be "13 years working with victims of domestic violence".

23. Dr Sang in his statutory declaration (Court Book p.137) sets out a description of the alleged domestic violence which includes reference

to verbal abuse, physical abuse, social isolation, financial deprivation and sexual abuse.

24. On 18 October 2002 a delegate of the First Respondent refused the Applicant's application for permanent residence (Court Book pp.182-187). The Applicant lodged an application with the Tribunal for review of that decision. On 26 February 2004 a differently constituted Tribunal affirmed the delegate's decision. The Applicant then sought judicial review of that decision and on 28 April 2005 orders were made by consent in the Federal Court (Court Book p.323) remitting the matter to a differently constituted Tribunal for reconsideration according to law. The orders included the issue of a writ of certiorari quashing the decision of the Tribunal made on 26 February 2004.
25. On 20 July 2005 a hearing was conducted by a differently constituted Tribunal by video link. Oral evidence was given by the Applicant and her present husband Mr Ngo. They were assisted by an interpreter and registered migration agent.
26. It is relevant to set out a record of what occurred thereafter taken from the Tribunal decision which is currently the subject of this application for review, the Tribunal relevantly states:

“23. There were all sorts of allegations levelled against the Applicant including some by Mr Burton and Mr Hong. These are unproven and the Tribunal finds them lacking in credibility. The Tribunal accepts the Applicant's explanations for those allegations and has not relied on them in reaching its decision.

24. The question of whether the couple was in a genuine and continuing married relationship at the time of lodgement of the primary application is one of fact having regard to all the circumstances of the case, in particular the various aspects of the relationship as set out in regulation 1.15A of the Regulations. As pointed out by the Court in R v Cahill [1978] 2 NSWLR 453, people enter into marriage relationships for a variety of reasons and under circumstances some of which may not necessarily conform with "community expectations".

25. The Federal Court in Nassouh v Minister for Immigration and Multicultural Affairs [2000] FCA 788 (14 June 2000)

requires a decision maker to address all the circumstances prescribed under regulation 1.15A(3) of the Regulations. These considerations relate to all of the circumstances of the relationship including the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the persons' commitment to each other.

26. *The question of whether the couple is in a genuine and continuing married relationship is one of fact having regard to all the circumstances of the case, in particular the various aspects of the relationship as set out in regulation 1.15A of the Regulations. As pointed out by the Court in R v Cahill [1978] 2 NSWLR 453, people enter into marriage relationships for a variety of reasons and under circumstances some of which, for reasons of race, religion or custom, may not necessarily conform with 'community expectations''. In Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (8 May 1990, unreported), the Full Court of the Federal Court found that,*

1. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.

27. *The Federal Court in Bretag v Immigration Review Tribunal (Federal Court O'Loughlin J, 29 November 1991, unreported) indicated that the Tribunal may have regard to the subsequent history of a relationship for the purpose of testing or determining whether the relationship was genuine and continuing at the time of application, so long as it "tends logically to show the existence or non-existence of facts relevant to the issue to be determined", quoting from Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139 at 160. The Tribunal, as with any decision maker in the process, should not act on 'mere suspicion or speculation' (Pochi,) nor should its decision be founded on irrelevant considerations.*

28. *When the primary application was lodged on 5 March 1998 the Applicant and Mr Burton were living together but had only met less than three months prior to that date, around Christmas of 1997. The Tribunal is conscious that the duration of the relationship per se is not determinative of the crucial issue of whether the couple is in a genuine and continuing married relationship at the material time.*

However there is no evidence before the Tribunal regarding the pooling of financial resources or the sharing of the household expenses or indeed about their domestic arrangements. Other than the two statutory declarations there is nothing to suggest that the Applicant's and Mr Burton's friends saw them as a couple at the time. There is no supporting evidence about the relationship from family or friends. It would be fair to described as lacking the evidence relating to the indices of a relationship as set out regulation 1.15A of the regulations.

29. *The Applicant has not discharged the 'common sense' burden of establishing the facts necessary to enable the Tribunal to reach a finding on the critical issue (see *Ladic v Capital Territory Health Commission* (1982) 5 ALN N60, followed in *Re Holbrook and Australian Postal Commission* (1983) 5 ALN N146). The Tribunal is unable to reach a finding that the Applicant was the spouse of Mr Burton at the time of lodgement of the primary application.*
30. *That stated, it is not necessary to consider whether the domestic violence provisions applied.*
31. *The Tribunal is conscious that the decision may seem harsh as the Applicant is now married to Mr Ngo who is either an Australian citizen or Australian permanent resident and has a two and a half year old child with him. However, those circumstances are irrelevant to the crucial issues before the Tribunal under this review." (sic)*

The Tribunal's findings

27. The Tribunal concluded that it had "no alternative but to affirm the decision under review" (Court Book p.469). It did so after referring to significant findings it made in its decision which include the following:

"60. The Tribunal acknowledges judicial authority (e.g. Cahill) for the proposition that people enter into marriages for a variety of reasons and in circumstances some of which, for reasons of race religion or custom, may not necessarily conform with community expectations, and defers to the Court's views as to the correct test to be applied by decision makers when assessing putative spousal relationships (vide Dhillon). However, after carefully considering and balancing the very limited evidence that has been provided in relation to the extent to which the parties meet the

requirements of regulation 1.15A, giving them the benefit of the presumption in subregulation 1.15A(5) and applying the tests outlined in *Dhillon and Nassouh*, the Tribunal is not satisfied that the relationship between the parties could properly be regarded as spousal within the meaning of that regulation. ***The evidence before the Tribunal indicates that the relationship between the parties involved minimal pooling and exchange of financial and material resources, did not involve the acquisition of joint assets or liabilities, and received the barest level of social and familial recognition. There is no evidence that the relationship provided either party with any degree of companionship or emotional support, minimal evidence of mutual commitment or exclusivity, and no evidence has been furnished in relation to their domestic arrangements.*** (emphasis added)

61. Accordingly, the Tribunal is not satisfied that at the time of application or the time of this decision, the visa applicant was the nominator's spouse within the meaning of regulation 1.15A. The Tribunal finds, therefore, that the review applicant does not satisfy the requirements of subclause 820.211(2) at the time of application or of paragraph 820.221(3)(a) of Schedule 2 to the Regulations at the time of decision. Having found that the visa applicant does not satisfy essential criteria for the grant of the visa, the Tribunal need not consider the remaining criteria, or make a finding in relation to her claims of domestic violence. However, in the interests of fairness and thoroughness, it will briefly comment on the visa applicant's domestic violence claims.

...

64. Against that background, the Tribunal notes that in the statutory declaration issued by Ms de Garcia (D1, f50), she nominates her occupational group as "Domestic Violence Specialist Service". No such occupational group appears in Division 1.5 generally or in regulation 1.21 specifically.

...

67. Ms de Garcia does not claim to be the manager or coordinator of a crisis or counselling service. In order to qualify as a competent person under regulation 1.21, she must therefore be the holder of a position with decision-making responsibility for a crisis and counselling service

that has a collective decision-making structure. Ms de Garcia claims solely to have decision-making responsibilities for case management within her employing agency. She does not claim that the agency has a collective decision-making structure, and that she occupies a position which carries decision-making responsibility within the agency. Her statutory declaration therefore fails to meet the requirements of subregulations 1.21(2) and 1.26(a) of the Regulations.”

(Court Book pp.463-464 and 469)

28. It is evident that the Tribunal's decision relied upon three factors, namely:

it was not satisfied having regard to the factors in regulation 1.15A(3) that the applicant was the spouse of Mr Burton at the time of the application;

it was not satisfied having regard to those factors that the applicant was the spouse of Mr Burton up to the time their relationship ceased;

the evidence supporting the applicant's domestic violence claims did not meet the requirements of division 1.5 of the Migration Regulations and on that basis the application must fail.

29. It is noted that the findings are summarised in paragraph 60 set out above which I have highlighted.

30. In the course of its findings the Tribunal did not determine whether domestic violence had occurred. Instead it found the Applicant had not supported the claim with the evidence required for the Tribunal to consider the claim as a non-judicially determined claim of domestic violence. So much is clear from paragraph 67 set out above where criticism is made that the Applicant had failed to support the claim with two statutory declarations of competent persons, given that the declarations, according to the Tribunal and Ms de Garcia, failed to meet the requirements of regulation 1.21 set out later in this judgment.

Relevant legislation

31. It is common ground that the Applicant in an application for a spouse visa is required to meet the requirements set out in clause 820 of the second schedule to the *Migration Regulations 1994* (the Regulations).
32. It is required that the Applicant is the spouse of an Australian citizen or permanent resident and was sponsored by her spouse.
33. There is no dispute that Mr Burton is an Australia citizen and was not subject to any prohibition from being a nominating spouse.
34. Regulation 1.15A sets out the test to be applied when determining whether one person is the "spouse" of another person, and relevantly provides:

“Migration Regulation 1.15A

Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

1.(a) in a married relationship, as described in subregulation (1A); or

2.(b) in a de facto relationship, as described in subregulation (2).

(1A) Persons are in a married relationship if:

1.(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

2.(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis.

(2) Persons are in a de facto relationship if:

...

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

1.(ad) a Partner (Migrant) (Class BC) visa; or

2.(ae) a Partner (Provisional) (Class UF) visa; or

3.(af) a Partner (Residence) (Class BS) visa; or

4.(ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

1.(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one party to the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses;

2.(b) the nature of the household, including:

(i) any joint responsibility for care and support of children, if any; and

(ii) the parties' living arrangements; and

(iii) any sharing of responsibility for housework;

(c) the social aspects of the relationship, including:

- (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
- 3.(d) *the nature of the persons' commitment to each other, including:*
- (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*
- (4) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).*
- (5) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*

35. Regulations 1.21(1) and (2) provide:

Interpretation

(1) *In this Division:*

"competent person" means:

1.(a) in relation to domestic violence committed against an adult:

- (i) *a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or*
 - (ii) *a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or*
 - (iii) *a person who:*
 - (A) *is a registered nurse within the meaning of section 3 of the Health Insurance Act 1973 ; and*
 - (B) *is performing the duties of a registered nurse; or*
 - (iv) *a person who:*
 - (A) *is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that Association; and*
 - (B) *is performing the duties of a social worker; or*
 - (v) *a person who is a court counsellor under the Family Law Act 1975 ; or*
 - (vi) *a person holding a position of a kind described in subregulation (2); or*
- 2.(b) *in relation to domestic violence committed against a child:*
- (i) *a person referred to in paragraph (a); or*
 - (ii) *an officer of the child welfare or child protection authorities of a State or Territory.*

independent expert *means a person who:*

- 1.(a) *is suitably qualified to make independent assessments of non-judicially determined claims of domestic violence; and*
- 2.(b) *is employed by, or contracted to provide services to, an organisation that is specified, in a Gazette Notice for*

this definition, for the purpose of making independent assessments of non-judicially determined claims of domestic violence.

"non-judicially determined claim of domestic violence" has the meaning given by subregulation 1.23 (1A).

"relevant domestic violence" has the meaning given by paragraph 1.23 (2) (b).

"statutory declaration" means a statutory declaration under the Statutory Declarations Act 1959 .

"violence" includes a threat of violence.

(2) the positions referred to in subparagraph (a) (vi) of the definition of competent person in subregulation (1) are:

1.(a) manager or coordinator of:

- (i) a women's refuge; or*
- (ii) a crisis and counselling service that specialises in domestic violence; or*

2.(b) a position with:

- (i) decision-making responsibility for:*
 - (A) a women's refuge; or*
 - (B) a crisis and counselling service that specialises in domestic violence;**that has a collective decision-making structure; and*
- (ii) responsibility for matters concerning domestic violence within the operations of that refuge or crisis and counselling service."*

36. Regulation 1.23(1)(a) deals with the determination of a claim of domestic violence and relevantly provides:

"When is a person taken to have suffered or committed domestic violence?"

(1) For the purposes of these Regulations:

1.(a) a person (the alleged victim) is taken to have suffered domestic violence; and ...”

37. Regulation 1.24 deals with the evidence required as follows:

“Evidence

(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:

1.(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:

(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and

(ii) a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory (other than a statement by the alleged victim); or

2.(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.

(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:

1.(a) the same subparagraph of paragraph (a) of the definition of competent person ; or

2.(b) subparagraph (b) (ii) of that definition.”

38. Regulation 1.26 provides:

“Statutory declaration by competent person

A statutory declaration under this regulation:

(a) must be made by a competent person; and

(b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and

- (c) *must state that, in the competent person's opinion, relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and*
- (d) *must name the person who, in the opinion of the competent person, has suffered that relevant domestic violence; and*
- (e) *name the person who, in the opinion of the competent person, committed that relevant domestic violence; and*
- (f) *must set out the evidence on which the competent person's opinion is based."*

Grounds of the application

39. In the "Re-Amended Application" dated 31 July 2006, the Applicant relies upon the following grounds:

"1.1 (a) At the hearing on the 20th July 2005 before the Tribunal, counsel for the applicant told the Tribunal that it was proposed to forward statements from the applicant and her husband to the Tribunal.

1.(b) By letter dated the 27th July 2005 the Applicant's solicitors wrote to the Tribunal and said that in a few days detailed statements from the Applicant and her present husband would be forwarded (Court Book 366) and subsequently the statements were faced to the Tribunal.

2.(c) By letter dated the 13th September 2005 the Applicant's solicitor said the Tribunal had not acknowledged the receipt of the witness statements and forwarded further copies of the witness statements (Court Book 373). The Tribunal's case management system recorded receipt by the Tribunal on the 27th July 2005 of witness statements.

3.(d) The Tribunal through its counsel subsequently instructed this Honourable Court that it did not have records of statements from the Applicant and her present husband being the statement referred to as CMC1 and CMC2 in the affidavit of Christina Marie Chang sworn on the 4th April 2006.

1.2 In failing to consider CMC1 and CMC2 the Tribunal ignored relevant material relevant to determination of

central issues and concluded in the absence of this material that it was not satisfied that "the relationship between the parties could properly be regarded as spousal" within the meaning of Regulation 1.15A(3) of the Migration Regulations.

1.3 Alternatively, if the Tribunal is held not to have received the aforesaid statements then the Tribunal was procedurally unfair in not informing the Applicant's solicitors that these statements had not been received and thereby depriving the Applicant of an opportunity to forward statements CMC1 and CMC2 for consideration by the Tribunal before a decision was made.

1.4 In failing to have regard to CMC1 and CMC2 as referred to in 1.2 and/or in failing to inform the Applicant if it was believed the statements had not been received as referred to in 1.3 the Tribunal committed jurisdictional error.

2.1 In relation to the application of regulation 1.15A(3) to the Applicant, the Tribunal erred in holding that:

1.(a) there is no objective evidence tendered in relation to financial aspects of the relationship (Reasons: para 54);

2.(b) that there is no evidence to support the claim that the parties bought a car registered in the name of the visa Applicant (Reasons: para 55);

3.(c) there is no evidence to support the claim that these parties provided financial assistance to the Applicant's mother as to the nature of the household (Reasons: para 55);

4.(d) that there is no evidence to support the Applicant's agent's claim as to how duties were allocated within the household (Reasons: para 56);

5.(e) that there was no evidence that the relationship provided either party with companionship or emotional support, exclusivity, and no evidence of the domestic arrangement (Reasons: para 66); and

6.(f) that the matters referred to in paragraphs 53 to 61 of the Reasons were exhaustive of the relevant considerations.

2.2 *The Tribunal ignored relevant evidence and/or considerations and in so doing committed jurisdictional error relating to the matters referred to in paragraph 2.1.*

3.1 *The Tribunal held that:*

(a) *it "must first determine whether the sponsor and the review Applicant were in a genuine spousal relationship within the meaning of Regulation 1.15A of the Regulations. Only where the Tribunal finds that such a relationship existed is it required to make a further finding in relation to claims of domestic violence" (Reasons: para 49);*

(b) *having found that "the visa applicant does not satisfy the essential criteria (for a "spouse") within Regulation 1.15A ... the Tribunal need not consider the necessary criteria, or make a finding in relation to her claims of domestic violence" (Reasons: para 61).*

3.2 *The Tribunal erred in law in considering that the claims and evidence in support of domestic violence meant that the Tribunal need not consider whether the existence of domestic violence was a relevant factor in determining whether the Applicant had been in a genuine spousal relationship.*

3.3 *In ignoring the relevant considerations referred to in 3.2 and asking itself the wrong question the Tribunal committed jurisdictional error.*

4.1 *The Tribunal erred in finding:*

1.(a) *that the statutory declaration of Ms De Garcia failed to meet the requirements of sub-Regulation 1.21(2) and 1.26(a) of the Regulations (Reasons: para 67);*

2.(b) *that Ms De Garcia is not a "competent person" under Regulation 1.21 because:*

(i) *she does not claim to be the manager or coordinator of a crisis or counselling service;*

(ii) *she does not claim that the agency has a collective decision making structure and that she carries a decision making responsibility within the agency.*

4.2 *The Tribunal erred in regard to its findings in 4.1 in that Ms De Garcia constitutes a "competent person" under Regulation 1.21:*

1.(a) the statutory declaration describes Ms De Garcia as a welfare worker being an ethnic resource supervisor on the Women's Refuges Multi-Cultural Service and therefore a competent person within the meaning of Regulation 1.21(2)(a);

2.(b) the statutory declaration describes Ms De Garcia as having decision making responsibilities on case management referable to victims of domestic violence within a women's refuge and thus fulfils the requirements of Regulation 1.21(b)(a).

4.3 *In ignoring material contained in the statutory declaration and further in misapplying the provisions the Tribunal committed jurisdictional error.*

4.4 *Further or alternatively to paragraphs 4.1, 4.2 and 4.3, if the Tribunal required any further clarification of the status of Ms De Garcia as a "competent person" the Tribunal ought, pursuant to s.359A of the Migration Act 1958, to have given to the Applicant particulars of any information in the Statutory Declaration that the Tribunal considered would be a reason, or part of a reason, for affirming the decision. The Applicant's solicitors, in a letter dated the 18th July 2005, expressly invited the Tribunal to point out whether the statutory declarations in its view met the prescribed requirements.*

4.5 *Further, failing to have regard to the "imperative duty" contained in s.359A of the Migration Act the Tribunal committed jurisdictional error.*

5.1 (a) *At the Tribunal hearing the Tribunal said it would be sending, through the Applicant's solicitors, a s.359A letter inviting comments, inter alia, upon accusations against Mr Ngo which would be taken into account by the Tribunal when making a decision (transcript pages 11 and 12). The Tribunal further said that it would be giving an opportunity to the Applicant to comment upon any material of an adverse nature (transcript page 13).*

- 1.(b) *By letter dated the 27th July 2005 the Tribunal wrote to the Applicant's solicitors inviting comment on attached documents said to be relevant to whether the applicant's relationship with her former spouse was genuine and continuing. None of the attached documents referred to the accusations made against Mr Ngo.*
- 2.(c) *The Tribunal said in its reasons that it would seek Mr Ngo's comments under s.359A of the Act on any adverse material (Reasons: para 30).*
- 5.2 (a) *By letter dated 18th July 2005 the Applicant's solicitors sought copies of documents contained in the chronology prepared by a Tribunal case officer. Amongst the documents sought were documents 14, 15-17, 19, 36, 37, 74, 75 and 85.*
 - 1.(b) *The documents referred to in 5.2(a) above were withheld from production to the Applicant's solicitors under s.375A of the Migration Act.*
- 5.3 *The Tribunal were procedurally unfair, in having said that it would give Mr Ngo and the Applicant an opportunity to comment upon accusations made against Mr Ngo, as referred to in paragraph 5.1 above and in then failing to do so.*
- 5.4 *The Tribunal were further procedurally unfair in failing to inform the Applicant of the substance of the material contained in the documents referred to in paragraph 5.2 above so that there was an opportunity for the Applicant to comment upon this material.*
- 5.5 *In failing to extend procedural fairness to the Applicant as described in 5.3 and 5.4, the Tribunal committed jurisdictional error."*

Submissions and reasoning

Ground 1

Applicant's submissions

40. To understand the Applicant's submissions it is necessary to refer to the various documents, some of which are annexed to affidavits and others found in the Court Book.

41. In support of this ground the Applicant referred to her affidavit sworn on 31 March 2006 (Exhibit A1). Reference was made to the transcript annexed to that affidavit namely "DP-2" where the following appears:-

"MR LINDSAY: Sir, If I could be permitted just to make a few submissions at this juncture. I certainly don't intend to go on for a very long time, but just before doing so I would say that we have got draft statements from the applicant and from her present husband, and we would propose to forward those to you very shortly."

42. It was noted that by a letter faxed and dated 27 July 2005 (Court Book p.366) the Applicant's solicitors state:-

"Please find enclosed short letters received from Huynh Thi Tam and Le Thi Ngoc Yen supporting the review applicant and providing information which they believe it is important for the MRT to know. English translations of their letters are also enclosed."

Under separate cover and in the next few days, we will forward to you the following:

- (i) detailed statement of the review applicant and her husband;*
- (ii) detailed submissions."*

43. It may be observed at this stage that the letter dated 27 July 2005 has the words, "by post and facsimile" and also appears to have two stamps. The first is a stamp "faxed" with the date "27/7/05" handwritten in the body of that stamp. The second stamp which appears to be a stamp from the "Migration Review Tribunal Victorian Registry" has stamped "received 01 Aug 2005".

44. Reference was made to the affidavit of Christina Marie Chang (Ms Chang) the solicitor for the Applicant sworn 4 April 2006 (Exhibit A2). In her affidavit comprising 573 pages Ms Chang relevantly deposes as follows:-

- “2. *I have examined the Court Book filed in this Court in relation to these proceedings by the respondent’s solicitors. I swear this affidavit so as to put before this Honourable Court various documents which were before the Tribunal being documents which had been provided to the Tribunal or otherwise supplied to the Tribunal after the date of the hearing, ie 20 July 2005, but received by the Tribunal prior to the Tribunal handing down its decision on 24 November 2005, being documents which have not been included in the Court Book filed herein.*
3. *Annexed hereto and marked with the letters “CMC-1” is a copy of the witness statement of the applicant’s present husband, Anh Ngo. This witness statement was forwarded to the Tribunal under cover of my letter to the Tribunal dated 27 July 2005.*
4. *Annexed hereto and marked with the letters “CMC-2” is a copy of the witness statement of the applicant which was forwarded to the Tribunal also under cover of my letter to the Tribunal dated 27 July 2005. A copy of the letter to the Tribunal is also reproduced in the Court Book on page 366.”*

45. (Court Book p.366)

46. Again it should be observed that reference is made to the letter dated 27 July 2005 (Court Book p.366) which it is noted Ms Chang claims was forwarded after the Tribunal hearing held on 20 July 2005 but received by the Tribunal prior to the date of its decision namely 24 November 2005. The witness statements of the Applicant’s present husband Anh Ngo and the witness statement of the Applicant were both claimed to be forwarded to the Tribunal under cover of the letter dated 27 July 2005.
47. It is to be observed that the extract from the letter of 27 July 2005 set out earlier in this judgment includes reference to “under separate cover and in the next few days we will forward you the following ...”.

48. Nevertheless it was submitted by the Applicant that by letter dated 13 September 2004 (Court Book p.373) the Applicant's solicitors referred to the earlier letter of 27 July 2005.

49. It is relevant to note that in the letter of 13 September 2005 from the Applicant's solicitors to the Tribunal the author states:-

"I refer to my letter to you dated 27 July 2005 which letter was faxed as well as posted.

As I have not received an acknowledgment of receipt from you in regards to whether you have in fact received the witness statements as well as the detailed submissions, I take the opportunity of again forwarding same to you.

I believe that these submissions and the witness statements properly address the Section 359A invitation to Comment on Information dated 27 July 2005. However, if the learned member has any further concerns, please do not hesitate to contact me."

50. (Court Book p. 373)

51. It is noted from that extract that the author enquires as to whether the Tribunal has "in fact received the witness statements as well as the detailed submissions" and then goes on to state that she takes "the opportunity of again forwarding same to you."

52. The statements from the Applicant and her present spouse allegedly forwarded to the Tribunal appear as Exhibit CMC 1 and CMC2 to the affidavit of Ms Chang sworn 4 April 2006.

53. It is noted that in the Court Book reference is made to submissions made on behalf of the Applicant (Court Book p.374-377) but the statements of the Applicant and her present spouse were not included.

54. The Applicant referred to the Tribunal's case management system. It was claimed that details of the system were obtained under a Freedom of Information application. Reference was made to the affidavit of the Applicant sworn 1 August 2006 (Exhibit A3). In particular reference was made to annexure "DP4" of that affidavit. It is appropriate to set out entries from that exhibit entitled "Case Management System Finalisation Summary as at 24 November 2005" where the relevant entries appear as follows:-

“27/0/7/2005...	359A letter sent. Rec witness statements from Rep	49
28/0/7/2005...	Received correspondence from Rep	0
01/08/2005 ...	Rec further witness statements from Rep	0
03/08/2005 ...	Rec letter submission from Rep	0”

55. Reference was made to the statements of the Applicant and her present spouse (CMC 1 and CMC 2 respectively) of the affidavit of Ms Chang sworn 4 April 2006 and it was submitted that those statements “address in significant detail the reasons why it is said the Applicant’s marriage to Lee Burton was a genuine and continuing one until domestic violence commenced”.

56. The first statement it is to be observed from Mr Ngo refers to the relationship with the Applicant and other matters which comprises 47 paragraphs. Two of those paragraphs are as follows:-

“3. *My relationship with the review applicant Pham Dieu Bao Tram (surname Pham) is that of husband and wife. I married Pham on 17 April 2003 in Katanning. Pham divorced her first husband Lee Burton on 10 February 2003.*

4. *Pham and I have a son Nicholas Quoc Viet Ngo born on 7 September 2001. Nicholas was born in Katanning.”*

57. The second statement of the Applicant (CMC 2) comprises 56 paragraphs directly dealing with the genuineness of the relationship between the Applicant and Mr Burton and also providing further information concerning alleged domestic violence.

58. The Applicant submitted that it is relevant to take into account the affidavit of Huynh Anh Ngo sworn 1 August 2006 (Exhibit A4) where he relevantly states the following:-

“4. *In paragraph 30 of the Tribunal decision, the Tribunal acknowledged that my current husband Anh Huynh Ngo had said that he disputed accusations that he had threatened other people as well as other allegations made against him. The Tribunal indicated that it would seek his comments under section 359A of the Act on any adverse material and would not take it at face value.”*

59. It was submitted that that evidence should lead to the conclusion that in all probability the statements were sent as suggested by the Applicant's solicitors, received by the Tribunal but thereafter mislaid. It was argued that on the evidence it is reasonable to conclude the Tribunal received the witness statements but mislaid them.
60. In the alternative it was submitted that in any event there should be no doubt that the Tribunal received the letter of 13 September 2005 (Court Book p.373). Reference was made to the extract from that letter set out earlier in this judgment. It was noted the Tribunal member was invited to contact the Applicant's solicitors in the event that there were any "further concerns". It was submitted the Tribunal ought to have contacted the visa Applicant to verify the whereabouts of the statements before making the decision. It was claimed the Tribunal had been advised at the oral hearing and subsequently in letters that witness statements were being forwarded and if they had not been received then it was for the Tribunal to ensure that it had all relevant documents.
61. It was argued that it is procedurally unfair for the Tribunal not to have regard to the statements if they had been received. If the statements had not been viewed by the Tribunal then it was argued procedural fairness required the Tribunal to point this out to the Applicant and its failure to do so constituted jurisdictional error.
62. During the course of further submissions the Applicant conceded that whilst there may not be direct evidence of the postage of the statements, the inference was open that the witness statements were posted to the Tribunal and received by it. Reference was made to the affidavit relied upon by the First Respondent of Hilary Lovibond sworn 31 July 2006. Ms Lovibond is the Victorian District Registrar of the Tribunal and had held that position since 29 August 2005. Her affidavit describes the case management system of the First Respondent in relation to applications lodged with the Tribunal. Reference was made to the following paragraphs in Ms Lovibond's affidavit,

"8. I have searched the physical file numbered W05/03472 and my searches reveal that there is no record of receipt of the witness statements by the MRT.

9. *On 3 April 2006 a new Case Management System, known as 'CaseMate' was implemented in the MRT. A snapshot of the data held in CMS as at 3 April 2006 was transferred into CaseMate. Consequently, the data contained in CaseMate is an exact replica of the MRT records kept in relation to the applicant's MRT files.*
 10. *I have searched CaseMate in respect of the applicant's MRT files and my searches reveal that there is no record of receipt of the witness statements by the MRT.*
 11. *The MRT file number W05/03472 contains a 5 page fax from Wojtowicz Kelly dated 27 July 2005, a copy of which is annexed hereto and marked "HL1".*
 12. *Also annexed hereto and marked "HL2" is a copy of a fax transmission report which confirms receipt of a 5 page fax from Wojtowicz Kelly on 27 July 2005.*
 13. *A copy of the 5 page document referred to in paragraph 11 was also received by the MRT by post on 1 August 2005.*
 14. *The MRT file number W05/03472 also contains a faxed letter from Wojtowicz Kelly Legal dated 13 September 2005 enclosing 4 pages of submissions, copies of which are annexed hereto and marked "HL3".*
 15. *Also annexed hereto and marked "HL4" is a copy of a fax transmission report which confirms receipt of a 5 page fax from Wojtowicz Kelly dated 13 September 2005.*
 16. *There is no record of the MRT file number W05/03472 of receipt of copies of the documents referred to in paragraph 14 above by post.*
 17. *Annexed hereto and marked "HL5" is a printout from CaseMate in respect of the applicant's MRT file number W05/03472. This 'legacy data' is an accurate record of, amongst other things, all correspondence sent and received by the MRT and telephone communications with the MRT in relation to this file."*
63. Reference was made to annexure "HL5" being a print out from what is described as "CaseMate" in relation to the Applicant's file. It was submitted that in that document there is an entry showing that the s.359A letter dated 27 July 2005 appears under the heading "start date". Under the heading "comments" the following appears:-

*“359A letter sent. Rec
witness statements from
Rep.”*

64. Reference was made to the affidavit of Peter John Corbould relied upon by the First Respondent and sworn 22 March 2006. Annexed to that affidavit and marked “PJC 2” is the letter dated 27 July 2005 described as the s.359A letter. That letter was omitted from the Court Book though it is noted in passing it has the same date as the letter referred to earlier in this judgment from the solicitors for the Applicant to the Tribunal (Court Book p.366). In any event the Applicant claims that the records of the First Respondent appear at least be consistent with receipt of the letter of 13 September 2005 (Court Book p.373) and the attached submissions (Court Book p.374-377) which appear to be faxed copies even though the letter itself states it was sent both by “post and facsimile”. Further, it is noted that the records of the First Respondent including the case management system set out above in this judgment indicate that a record was made of receiving “witness statements” from “rep” on 27 July 2005. It is also noted that the same record reveals that on 14 September 2005 there is an entry “Rec further submissions from Rep”. It was argued this is consistent with receipt of the letter of 13 September 2005 though of course it only refers to “further submissions” and not “witness statements”.
65. Reliance was placed by the Applicant upon an affidavit of Helen Monika Kadner (Ms Kadner) sworn 1 August 2006 (Exhibit A5) where the deponent relevantly states the following:-
- “5. From time to time, more than one letter addressed to the same addressee is put in the one envelope to minimise postage and handling.”*
66. Reliance was placed upon that paragraph by way of response to submissions made by the First Respondent concerning the postal records of Ms Kadner not showing that the statements were actually posted. For convenience it is appropriate to note that annexure “HMK-1” of Ms Kadner’s affidavit is described as the relevant pages “from the firm’s mail book confirming the despatch of various correspondence to the Tribunal during the relevant period.” It shows that on 27 July 2005 correspondence was forwarded to the Tribunal on behalf of the Applicant and likewise on 28 July 2005 reference was

made to correspondence presumably the correspondence set out in the Court Book at p.371 namely a letter dated 28 July 2005 date stamped by the Tribunal as received on 3 August 2005. The mail book extract also reveals that on 22 September 2005 correspondence was forwarded to the Tribunal. It does not seem to be in dispute that the mail book record contains only a brief reference of the addressee, the date, file number and the subject. This appears to be the case for all items and whilst there is a stamp across the page at various parts reading, “POSTED” the entries do not reveal the contents of the material posted. As I understand the Applicant’s submissions however it is argued that by putting in one envelope more than one letter addressed to the same address to save postage the Court may infer that the relevant documents were actually posted to the Tribunal.

67. In the alternative it is further submitted that the correspondence from the Applicant’s solicitors dated 27 July 2005 (Court Book p.366) and 13 September 2005 (Court Book p.373) together with submissions (Court Book p.376) “demonstrates that (the solicitors) believe the statements of the Applicant and her husband which counsel had said at the hearing would be forwarded had been forwarded”. It was further submitted that the letters show that Ms Chang asked the Tribunal to verify whether in fact the witness statements which had been identified in the letter of 27 July 2005 had been received.
68. The Applicant does not concede that jurisdictional error is confined to breach of the natural justice rule. It was argued that even if the Court finds the Tribunal had not received the witness statements then the Tribunal ought to inform the Applicant’s solicitor that the statements had not been received and accordingly responded to the solicitors enquiry. By ignoring a request by the solicitor to confirm the statements had arrived it was argued the Tribunal ignored a relevant consideration which is not limited to evidence.
69. It would appear to be common ground that concessions were appropriately made by the First Respondent that if the Court were to find that the statements had been forwarded to the Tribunal then those statements are directly relevant to the issue before the Tribunal and the Tribunal accordingly was required to have regard to the statements. It is again common ground that if the statements were received by the

Tribunal then its failure to have regard to the statements would constitute a failure to exercise jurisdiction. It is otherwise common ground that the Tribunal did not in this instance have any regard to the statements.

70. The Applicant submitted the Tribunal ought to have notified the Applicant's solicitors that the statements had not been received given that the absence of evidence about the genuineness of the relationship was the reason or at least part of the reason for the adverse determination. As I understood the Applicant's argument, it was submitted that if s.357A confines a natural justice rule to the matters set out in Division 5 which is the construction placed upon it by the Full Court of the Federal Court in *Lay Lat v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 61 (Lay Lat) and *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 (SZCIJ) then it was argued that a breach of that rule in any event occurred because of the Tribunal's failure in its duty to provide the Applicant with "particulars of any information" that the Tribunal would consider may be a reason for affirming the decision. The information it was argued was that the witness statements had not been received pursuant to the Tribunal's own request in its correspondence of 27 February 2005.
71. The Applicant sought to argue that in any event the decision of the Full Federal Court in *Lay Lat* was obiter and sought to rely upon the decision of Gray J in *Antipova v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 584 (Antipova). It is not necessary for the Court to further consider those submissions as this Court in the past has found that whilst the decision of the Full Court in *Lay Lat* may have been obiter it remains the fact that the same Full Court in *SZCIJ* made a decision adopting the reasoning in *Lay Lat* and the second decision of the same Full Court could not be regarded as obiter and this Court is therefore bound by the Full Court decision in both cases even though in the first instance it may be arguable that the decision was "obiter".

First Respondent's submissions

72. The First Respondent properly made the concessions referred to earlier in this judgment concerning Ground 1.

73. It was submitted however that relevant presumptions exist regarding the receipt of documents forwarded by post. Reference was made to s.29 of the *Acts Interpretation Act 1901* which provides:-

“(1) Where an Act authorizes or requires any document to be served by post, whether the expression “serve” or the expression “give” or “send” or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(2) This section does not affect the operation of section 160 of the Evidence Act 1995.”

74. Reference was also made to s.160 of the *Evidence Act 1995* (Cth) which provides:-

“(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.

(2) This section does not apply if:

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

(3) In this section:

“working day” means a day that is not:

(a) a Saturday or a Sunday; or

(b) a public holiday or a bank holiday in the place to which the postal article was addressed.

Note: Section 182 gives this section a wider application in relation to postal articles sent by a Commonwealth agency.”

75. It was argued that the provisions operate only when the relevant article has been posted.
76. The First Respondent correctly identified the crucial issue in the present case namely whether the relevant statements were sent by post. It was argued that there is no direct evidence that they were posted to the Tribunal and nor should there be any inference drawn by the Court that they were posted based upon the available evidence.
77. Reference was made to the affidavit material relied upon by the Applicant and it was noted that no covering letter has been provided which purports to forward the statements and that the affidavit of Ms Chang was claiming that the documents were forwarded with her letter of 27 July but does not specifically state that she posted them.
78. Specific reference was made to the letter at Court Book p.366 where the author states, “Under separate cover and in the next few days we will forward you the following ...” namely “detailed statement of the review Applicant and her husband”. It was otherwise submitted there is no evidence from Ms Chang that the statements were faxed either on 27 July or indeed on 13 September.
79. Reference was made to other affidavit material from the Applicant and her husband (both sworn 1 August 2006, Exhibits A3 and A4) and it was submitted they do not assist in determining whether the statements were sent.
80. It was argued the affidavit of Ms Kadner referred to earlier in this judgment together with the postal record does not demonstrate the statements were posted. It was noted that the Applicant has not produced any fax transmission records for either 27 July or 13 September revealing the number of pages forwarded.
81. The First Respondent referred to the affidavit of Ms Lovibond and it was submitted that evidence demonstrates the statements were not received. Receipt of the letter of 27 July without statements by a fax of

5 pages on 27 July and by post on 1 August. The receipt of the fax on 13 September with 4 pages of submissions was noted but there is no receipt of a letter by post. It was noted that annexure HL5 of the affidavit of Ms Lovibond reveals receipt of other documents in the Court Book namely:-

“6.9.3. in annexure HL5, the receipt of various items all of which correspond to other documents in the Court Book, that is:

6.9.3.1. 28 July – the letter at CB 371 by fax;

6.9.3.2. 1 August – the letter at CB 366 by post;

6.9.3.3. 3 August – the letter at CB 371 by post;

6.9.3.4. 14 September – the submissions of 13 September;

6.9.3.5. 19 September – another fax. As 16 September was a Friday, this is most likely the fax of that date at CB 387. This is confirmed by the next entry showing receipt of that item by post on 20 September. The letter at CB 378 is date stamped for receipt on 20 September.”

82. The Respondent also relied upon an affidavit of Victoria Coleman (Ms Coleman) sworn 31 July 2006 (Exhibit R2) where the deponent after referring to the affidavit of Ms Lovibond otherwise deposes:-

“3. On or about 22 May 2006 I searched the MRT’s physical file numbered W02/07809 in relation to the applicant, Dieu Bao Tram Pham. My searches revealed that there was no record on that file of receipt of:

(a) the witness statements of Ngo Huynh Anh and the applicant which are the annexures marked “CMC-1” and “CMC-2” to the affidavit of Christina Marie Chang sworn on 4 April 2006; and

(b) a letter from Wojtowicz Kelly Legal dated 13 September 2005 enclosing submissions.”

83. The First Respondent submitted that accordingly there is no direct evidence that the statements were posted or sent by fax and nor does the evidence support an inference that they were posted or sent. Rather the evidence demonstrates they were not received by the Tribunal and

the Court should find the statements were not sent to the Tribunal on either of the occasions upon which the Applicant relies.

84. It was otherwise submitted in the alternative that whilst the correspondence together with the transcript reveals that the representative of the Applicant gave notice to the Tribunal of an intention to forward statements, the proceedings are subject to s.357A of the *Migration Act 1958* (the Migration Act). It was argued the provisions of the Migration Act referred to in that section are an exhaustive statement of the requirements of the natural justice hearing rule and reliance was placed upon the decisions of the Full Court in *Lay Lat* and *SZCIJ*.
85. It was argued there was no failure on the part of the Tribunal to comply with any of the provisions of Part 5 Division 5 or ss.375, 375A or 376 of Division 8A of the Migration Act in the conduct of the review and that accordingly the ground should fail.
86. It was argued that the Tribunal received all the material forwarded by the Applicant and could not be claimed to have misled the Applicant as to what had and had not been received. It was further argued the Tribunal did not make its decision until approximately 4 months after the hearing and that accordingly there was a reasonable time for the Applicant to forward all material upon which she wanted the Tribunal to consider the application.

Reasoning

87. In my view the practice and procedure followed by the Applicant's solicitors on the evidence before me appears to be clearly deficient. The crucial correspondence namely the letter of 27 July 2005 (Court Book p.366) and 13 September 2005 (Court Book p.373) appear to have inconsistencies.
88. At the very least I am not satisfied that the correspondence on both occasions was necessarily posted.
89. The first letter of 27 July 2005 does not provide evidence that enclosed with that letter were detailed statements of the review Applicant and her husband. Whilst I am satisfied the letter was forwarded by

facsimile transmission to the Tribunal I am not prepared to find that that letter at that time contained the detailed statements of the review Applicant and her husband. So much is clear from the wording of that letter referred to correctly by the First Respondent. Unfortunately I should add that the letter whilst enclosing other short letters does not endorse upon the letter that those enclosures were included in the letter. Proper practice would dictate that the list of enclosures should be endorsed upon the covering letter. In any event I conclude that the letter of 27 July 2005 did not include the witness statements which are critical to this application.

90. The letter dated 13 September 2005 (Court Book p.373) whilst not appearing to have endorsed upon it a received stamp from the Tribunal I accept was forwarded to and received by the Tribunal on or about 13 September 2005. Again however there is a deficiency in that letter as although the letter had “Enc” typed at the bottom of the page, it does not itemise the items enclosed.
91. The evidence of Ms Kadner is of limited assistance as again the information provided by that witness is general and does not demonstrate that the witness statements were actually posted as annexures to the two relevant items of correspondence.
92. The deficiencies in the method of operation of the Applicant’s solicitors have led to the current difficult issue where statements clearly relevant to the matter before the Tribunal ought to have been the subject of a proper covering letter identifying the statements which were clearly important documents to be considered by the Tribunal particularly having regard to the s.359A letter and concerns the Tribunal had in reaching its decision.
93. Despite the deficiencies in the correspondence I am at least prepared to accept and make a finding that the letter of 27 July 2005 at the very least foreshadows that detailed statements of the review Applicant and her husband would be forwarded “under separate cover and in the next few days” to the Tribunal. I am further prepared to find that Ms Chang, the solicitor for the Applicant, appears to have at least formed the view that the witness statements were forwarded with the same correspondence which included what she describes as the “detailed submissions”. The second letter at least indicates in clear

terms that the author of the letter of 13 September 2005 took the “opportunity of again forwarding same to you”. Of course that begs the question as to whether or not the intention expressed in that letter was carried out by the author or that she caused the statements to be attached, either to the facsimile transmission or the letter as allegedly posted. It is clear however that the author of the letter directly refers to the witness statements and the written submissions as properly addressing “the s.359A invitation to comment on information dated 27 July 2005”.

94. I conclude from the contents of the letter together with the affidavit material that at the very least the Tribunal was put on notice that relevant witness statements existed and that the solicitors for the Applicant had a belief that those statements had been forwarded on one and probably two occasions prior to the date upon which the Tribunal delivered its decision and further, that those statements were relevant to the issue raised by the Tribunal in its s.359A letter.
95. Perhaps of greater significance and indeed of some assistance to the Applicant is the fact that both letters were at least received by the Tribunal. Further, it would appear from the documents obtained under Freedom of Information legislation namely the Case Management System print out (Annexure DP4 to the affidavit of the Applicant sworn 1 August 2006) that on 27 July 2005 the Tribunal records “Rec witness statements from Rep”.
96. Although I have grave reservations concerning the procedure followed by the Applicant’s solicitors, it is my concluded view that that entry in the Case Management System combined with the foreshadowing and/or reference to the witness statements in the correspondence to which I have referred leads me to infer that the statements were posted after 27 July and the Tribunal did in fact receive the witness statements at least on a date after 27 July and prior to the date upon which it delivered its decision.
97. I am strengthened in my conclusion that the witness statements were forwarded and received as a result of the entry in the Case Management System which records “Rec further witness statements from Rep” which I accept are in addition to the other witness statements recorded as having been received on 27 July 2005. Given

the date of the correspondence and the date of decision it is not necessary to rely upon any deeming provisions in relation to receipt after forwarding by post.

98. The delay between 27 July and 1 August may well be explained by the fact that the 27 July letter foreshadows sending the statements in addition to those already recorded as received by the First Respondent and that they were sent after 27 July without a covering letter and received on 1 August.
99. I also have regard to the fact that the submissions received on 14 September (Court Book p.376) refer to the statement of the Applicant as 'her statement'.
100. Although I have reached that conclusion somewhat reluctantly it follows nevertheless that the Tribunal having received those items, albeit in the unsatisfactory way that I have described, was then bound to give consideration to the statements.
101. The mere fact that the statements may have somehow been mislaid by the Tribunal does not mean that the Applicant could not reasonably expect the Tribunal would consider and rely upon the witness statements. After all the Applicant had no way of knowing whether the Tribunal had not received the statements given that the invitation by Ms Chang in her letter of 13 September 2005 to the Tribunal to contact her should there be any concerns did not receive a reply. The author of at least that letter would have the reasonable expectation that the statements had been received given that they had foreshadowed in the 27 July 2005 correspondence and referred to clearly in the 13 September 2005 correspondence. It is noted in passing from the affidavit of Mr Corbould that at least one other item namely the Tribunal's own letter dated 27 July 2005 was not included in the Court Book. The "Case Finalisation Checklist and Handing Down Record" referred to by Mr Corbould in his affidavit as part of Annexure PJC2 does not greatly assist as it appears to provide a somewhat vague description of the documents allegedly mailed on 24 November 2005. The system of recording documents both by the Applicant in covering letters and by the Tribunal appears in this instance to have led to a significant degree of confusion.

102. On balance I am satisfied that despite the Applicant's solicitors in part being responsible for that confusion, I am prepared to draw the conclusion albeit somewhat reluctantly set out earlier in this judgment. Having found that the statements were posted and received by the Tribunal based in part upon its own records and by inference from the correspondence, I am satisfied that failure to consider the relevant statements is sufficient to constitute jurisdictional error.
103. I should add that I share the reservations expressed by the First Respondent concerning the lack of evidence of any facsimile transmission records which would reveal the number of pages transmitted and otherwise the vagueness of the evidence. It is only the combination of the content of the letters and the Tribunal's own record of having recorded that witness statements were received from the Applicant's representative that I have reached the conclusion which in turn has resulted in a finding of jurisdictional error.
104. In the event that my finding concerning the witness statements is incorrect it is clear to me as submitted by the Applicant that the Tribunal was certainly put on notice both in the letters of 27 July 2005 and 13 September 2005 of the existence of witness statements relevant to the Tribunal's task. I accept that the Tribunal ought to have contacted the representative of the Applicant to determine the whereabouts of the relevant statements before it made its decision. It had been advised of the desire to rely upon statements at the hearing and clearly in the subsequent correspondence.
105. As noted earlier in this judgment however I accept this Court is bound by the Full Court of the Federal Court decisions in *Lay Lat* and *SZCIJ* though s.357A is confined to the natural justice rules relating to those matters set out in Division 5 of the Migration Act.
106. It does seem to me however that the information that witness statements had not been received by the Tribunal is logically part of the information it had sought in its s.359 letter and having not received at least in part the material relied upon in response, I am prepared to accept that the Tribunal should then have provided a further s.359A letter indicating that it had information namely "witness statements" but that it did not receive those witness statements. The failure to notify the Applicant that the Tribunal had not received witness

statements clearly referred to in correspondence renders the effect of the s.359A letter futile. It is clear the Tribunal appropriately sought further information and initially complied with its obligations to forward a s.359A letter. Once it became aware that there were witness statements prepared in response to its s.359A letter but apparently not received by the Tribunal then it was obliged to bring that information in my view to the attention of the Applicant's advisers.

107. I otherwise accept the alternative argument that the Tribunal has ignored a relevant consideration namely the foreshadowed witness statements. By simply proceeding with its task and presumably not having received or having had placed on the file the witness statements which I have found were forwarded, the Tribunal has clearly failed to have regard to a relevant matter whether it be the witness statements themselves or the fact that witness statements were claimed to have been forwarded. In either event that constitutes a sufficient basis to find jurisdictional error.
108. It will be evident from the reasoning that I have not relied on those paragraphs from the affidavits tendered by the parties which may be regarded as irrelevant and/or argumentative. Accordingly it is not necessary for the Court to formally rule upon the objections taken to the affidavits at the commencement of the proceedings. A similar approach will be taken in relation to the other grounds to the extent that the affidavit evidence is relied upon by either party.
109. For the reasons stated ground 1 succeeds and appropriate orders should be made.

Ground 2

110. It was submitted that the Tribunal in applying subregulation 1.15A(3) of the Regulations ignored the existence of relevant evidence.
111. Regulation 1.15A(3) has previously been referred to in this judgment.
112. In support of this ground reference was made to the following relevant paragraphs from the Tribunal's decision:-

“53. The parties were married to each other in Australia on 16 February 2998. At the time of decision they are divorced.

Financial aspects of the relationship

54. *No objective evidence has been tendered in relation to this criterion, apart from documentary evidence that the parties opened an ANZ Access account at the time of their wedding (see paragraph 42 above). Even so, there is no evidence that it was used, for what purpose it was used, or by whom it was last used. Instead, the parties' agent has simply provided a submission dated 30 August 2000 in which he claimed that the absence of joint ownership of real estate, major assets or joint liabilities was not unusual given that the parties were both very young in their married life, and that the applicant was a newcomer in this country who was not allowed to work. He claimed that the nominator was the only source of the family's income, and while the nominator went out to work, the applicant helped save a lot of money for the family by taking care of most of the domestic chores.*
55. *It was also claimed that the parties spent a significant amount of money (AUD\$220) for their wedding rings, as well as meeting the costs of the wedding celebration and reception, photographs and application to remain in Australia. The agent also claimed that the applicant and the nominator, even though not on a regular basis, did provide her moth with some financial assistance. It was claimed that in early 2000, the parties bought a car registered in the name of the visa applicant and paid from their bank account. There is no evidence to support the latter two specific claims.*

The nature of the household

56. *The agent has claimed that although the nominator spent much of his time at work to earn money while the applicant handled most of the domestic work, the couple endeavoured to share the responsibilities for other housework whenever they could, in particular during the weekends e.g. gardening and cleaning. No evidence was submitted to support those claims.*

The social aspects of the relationship

57. *The parties' agent has claimed that the applicant and the nominator always represented themselves as being married to each other and were regarded as such by other people. It was further submitted that the visa applicant's employer (Mr Billy Hong) and the nominator's supervisor (Mr Russell*

John Pointon) have provided statutory declarations attesting to the genuine and continuing nature of their relationship. The Tribunal notes that Mr Hong subsequently visited the Department to withdraw his support for the visa applicant.

The nature of the persons' commitment to each other. Whether the relation is genuine and continuing (noting that subregulation 1.15A(5) provides that living together at the same address for 6 months or longer is to be taken to be strong evidence that a relationship is genuine and continuing)

58. *The parties' agent has asserted that the parties had lived together as husband and wife for more than two years before their marriage broke down irretrievably in June 2000. The agent claimed that it was the parties' commitment to the relationship that helped them to overcome marital problems caused by such factors as 'domestic violence, social and family isolation, cultural clash, language barrier, etc.'*

59. *Whilst the Tribunal acknowledges that the parties appear to have cohabited for about two years, and it is bound by the terms of subregulation 1.15A(5) to regard that fact as strong evidence that the relationship is genuine and continuing, it is not in itself determinative of the matter; and must be viewed in the context and as an element of the totality of the evidence."*

113. (Court Book p. 463)

114. It is also relevant to refer to paragraphs 60 and 61 of the Tribunal decision set out earlier in this judgment.

115. It will be noted from the extracts of the Tribunal decision that the Tribunal specifically refers to there being "no evidence" in relation to the financial aspects of the relationship, provision of financial assistance to the Applicant's mother and the purchase of a car. Further, it found no evidence to support claims of shared responsibility for housework.

116. The Applicant submitted that there was evidence in relation to the financial support for the Applicant's mother and the purchase of the car. Reference was made to submissions relied upon by the Applicant

from the Migration Agent under cover of letter dated 30 August 2000 and specifically the following paragraphs in those submissions,

“18. I submit that the couple spent a significant amount of money for their wedding rings, wedding celebration and reception, photographs and application to remain in Australia. The applicant and her husband, even though not on a regular basis, did provide her mother with some financial assistance (Telegraphic Transfer Receipt attached)”

19. I submit that early this year, they bought a car (a Ford 90), registered in the name of the applicant and paid by their bank account (Bank statement attached)”

117. (Court Book p.126)

118. It was further submitted that the Applicant gave evidence in relation to the claim that she handled most of the domestic work whilst Mr Burton spent time at his employment earning money and that there was a sharing of the gardening and cleaning. Reference was made again to the submissions referred to previously and in relation to this issue the following paragraph,

“20. I submit that even though the husband spent much of his time to work to bring home the money and the applicant handled most of the domestic works, the couples endeavoured to share the responsibilities for other housework whenever they could, in particular during the weekends eg. gardening, cleaning.”

119. (Court Book p.126)

120. Reliance was also placed upon the affidavit of Applicant sworn 31 March 2006 (Exhibit A1) and in particular transcript annexed to that affidavit being Annexure DP2 as follows:-

“THE INTERPRETER: In our first year of marriage we were very happy with one another. Lee was working at the time and during that time I was staying home and doing home duty. Some time going out to do some shopping or walking the dog around. At that time we were so happy with one another and normally at weekends we used to go to the park, or sometimes we had barbecue, or to visit other friends. And sometimes Lee took me to go to the shop and bought me clothes, short, a few items, clothing items. And I feel very happy with him in the first year.”

121. It was also submitted that the Applicant had requested the Tribunal to take oral evidence from Mr Burton. This appears in the Request for Hearing Form (Court Book p.255).
122. Reference was made to paragraph 60 of the Tribunal decision set out earlier in this judgment where the Tribunal refers to “balancing the very limited evidence” and not being satisfied that the “relationship between the parties could properly be regarded as spousal within the meaning of that regulation”. Again reference was made to the comment by the Tribunal that there is “no evidence that the relationship provided either party with any degree of companionship or emotional support, minimal evidence of mutual commitment or exclusivity and no evidence had been furnished in relation to their domestic arrangements”. It was submitted that the Applicant provided evidence as to the domestic arrangements and had further stated that the commitment to the relationship had previously helped overcome social and family isolation, cultural clash, language barrier and other facts. The Tribunal failed to analyse that evidence or recognise the significant issues in its reasons. Again, reliance was placed upon the Applicant’s affidavit of 31 March 2006 and in particular the transcript Annexure DP2 including the extract set out above together with the following extract,

“THE INTERPRETER: I just want to let you know that the marriage with my ex-husband, we broke up, was due to many reasons in it. The very first reason was due to our custom or culture, because we have a very short time to make a decision to marry. And at that time I was only 23 years old. And the time when I live in Australia, found out there was so many differences. Like, there are men in Australia, they have to drink beer every day, especially at the weekend. They have to have a lot of friends coming and the kind of music that they are listening to is very loud music, things like that. And they are smoking, going to pub. And according to the Vietnamese culture, after we marry we need time for each other, especially on the weekend we need some private time for both of us. And I am a non-smoker and I am not a drinker as well.”

123. It was submitted that subregulation 1.15A(3) requires the Minister to have regard to “all the circumstances of the relationship” and not just the specific matters referred to in the subregulation. It was submitted the Tribunal failed to have regard to any other matters. By way of

example reference was made to the Vietnamese friend of the Applicant Nguyen Minh who describes the Applicant's initial love for Mr Burton and how she was told of the domestic violence. Further reference was made to the Applicant's mother describing telephone conversations with her daughter concerning Mr Burton at the relevant period. It was argued that evidence was ignored. That evidence appears in the Court Book at pp.397 and 400.

124. It was noted that the statement in Annexure CMC 2 to the affidavit of Ms Chang sworn 4 April 2006 detailed the Applicant's relationship with Mr Burton and the reason for the relations failure. Consistent with the submissions made in relation to ground 1 this material was not considered by the Tribunal.
125. It was submitted that the significant adverse finding by the Tribunal that the relationship could not be regarded as "spousal" rested almost entirely on the brief analysis of the indicia of subregulation 1.15A(3). It was submitted that by ignoring relevant material the Tribunal committed jurisdictional error.

First Respondent's submissions

126. The First Respondent submitted that there is no jurisdictional error as the Tribunal decision does not demonstrate that it misunderstood what was required by regulation 1.15A. Reference was made to paragraph 38 of the Tribunal decision where it relevantly states,

"38. Paragraph 820.211(2)(a) requires that the review applicant be the spouse of the nominator at the time of application. Regulation 1.15A sets out the test to be applied to determine whether one person is the 'spouse' of another person, whether in a married or a de facto relationship. In Nassouh v Minister for Immigration and Multicultural Affairs [2000] FCA 788, the Federal Court considered this provision of the Regulations, concluding that subregulation 1.15A(3) sets out mandatory considerations. Accordingly, the Tribunal, in forming an opinion whether a married relationship or de facto relationship exists, must take into account the considerations set out in subregulation 1.15A(3). These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects

of the relationship and nature of the persons' commitment to each other."

127. (Court Book p.459)
128. Particular emphasis was placed upon the Tribunal's statement that the considerations "relate to all of the circumstances of the relationship". It was argued that it could not be claimed the Tribunal failed to understand its task or that it had confined itself to the matters set out in paragraphs (a) to (d) of regulation 1.15A(3).
129. The Tribunal's findings in relation to the spousal relationship it was argued were limited because the Applicant put forward limited evidence in support of her claim.
130. When considering the relationship the Tribunal had regard to the declarations provided in support by the Applicant and to the fact that the parties lived together for about two years (see paragraph 59 of the Tribunal decision). The Tribunal it was argued recognised the "presumption" arising from the period of time the parties lived together but was not satisfied regarding the spousal relationship. That finding was a finding of fact free of error according to the First Respondent's submissions.
131. It was further submitted that the Tribunal distinguished between evidence and submissions. It referred to the submissions made on the Applicant's behalf in its decision (see paragraphs 56, 57 and 58) when those submissions were not supported by evidence. The challenge to the Tribunal's approach by the Applicant failed to maintain the distinction between submissions and evidence.
132. It was further submitted that the fact that the Tribunal did not consider the allegations of domestic violence as part of the material showing the existence of a spousal relationship does not show that it misunderstood the question it was required to consider.

Reasoning

133. In my view whilst superficially it may appear that there is some evidence which then in turn would not justify a "no evidence" finding by the Tribunal, it is clear that on a proper analysis of the Tribunal's

reasoning that it has discharged the duties required of it pursuant to regulation 1.15A(3). It is regrettable that there was limited evidence available and that a great deal of the material was provided by way of submission. Simply because a submission is made does not mean of itself that the submission constitutes evidence. Of course evidence may be adduced in support of a submission.

134. In the present case the submission has validly drawn a distinction between submissions and evidence as submitted by the First Respondent. It has otherwise drawn conclusions of fact reasonably open to it on the evidence. It is not required to recite each and every aspect of the evidence and although I have some concern about the use of the expression of “no evidence” it appears to me in this particular case that whilst using that expression it seems to me it arose from an analysis of the material. For example when considering the evidence of the relationship the Tribunal relevantly stated in paragraph 60 that there is “no evidence that the relationship provided either party with any degree of companionship or emotional support ...” It further states that there was “minimal evidence of mutual commitment or exclusivity” before then referring to there being “no evidence ... furnished in relation to their domestic arrangements”. In my view the comments need to be taken in context. Mere submissions as to the nature of the household and social aspects of a relationship do not constitute evidence and on my reading of this decision it seems to me that the Tribunal is really making the distinction between submissions and evidence when it refers to there being “no evidence”.
135. Accordingly I am not satisfied that this ground can be sustained and otherwise accept the submissions made for and on behalf of the First Respondent.

Ground 3

Applicant’s submissions

136. It was submitted that the Tribunal held it must first determine whether the spouse and review Applicant were in a genuine spousal relationship within the meaning of regulation 1.15A of the Regulations and only

when such a relationship was found to exist is it required to make a further finding in relation to the claims of domestic violence.

137. It was submitted that even if it was true to conclude that making a finding adverse to the Applicant about the relationship may make a legal finding in relation to domestic violence unnecessary, the Applicant submitted that subsequent evidence of domestic violence is relevant to a consideration of whether there was in existence a genuine relationship at an earlier stage.
138. It was argued that there was an error and misinterpretation of the relevant provision for the Tribunal to conclude that it need not consider the evidence of domestic violence in assessing the genuineness of the marriage. This was sufficient to constitute jurisdictional error.
139. It was noted that the First Respondent had accepted the evidence as to what happened at a subsequent stage may show the state of the relationship at an earlier time but only when the evidence tends to logically show the existence or non existence of facts relevant to the issue to be determined. The Applicant argued that whether the allegations of domestic violence are relevant or not, the consideration of whether domestic violence actually occurred “would surely be relevant, especially when it is concluded the Applicant may have entered into the marriage for sham reasons.” It was argued that if the Applicant was a victim of domestic violence and this violence forced her to separate from Mr Burton then that has relevance to the assessment of whether prior to the violence she and her husband had a genuine marriage. It was submitted the Tribunal declined to consider that evidence.

First Respondent’s submissions

140. The First Respondent submitted that the evidence before the Tribunal did not require consideration of the evidence of domestic violence as relevant evidence of a genuine married relationship at an earlier stage.
141. It was submitted that the evidence of what happened later may show the state of the relationship earlier but that is when the evidence “tends logically to show the existence or non existence of facts relevant to the issue to be determined” (see *Bretag v Immigration Review Tribunal*

(Unreported Federal Court per O’Loughlin J 29 November 1991) (Bretag).

142. It was submitted that the allegations of domestic violence in the present case were not relevant in the sense referred to by the Court in *Bretag*.

Reasoning

143. In my view the First Respondent’s submissions in relation to this matter are correct.

144. I should add for the sake of completeness that this Court in the matter of *Collins v Minister for Immigration* [2003] FMCA 571 (Collins) relevantly stated the following:-

“42. ... *The determination of whether there is a genuine spousal relationship however in my view as a matter of law is properly to be considered by the MRT as a primary issue. So that there is no misunderstanding I did not otherwise accept the submissions by the Applicant but having made an adverse finding in relation to that matter it is still necessary for the MRT to consider the evidence of alleged domestic violence for the purposes of the regulations. My reading of sub-regulation 8 is that the clear inference and basis upon which that regulation is to be applied is that applies to the relationship which at least at one point could be regarded as a genuine spousal relationship. Otherwise the purpose and intent of the regulation and its meaning on a proper reading would make little sense particularly in circumstances where there may be a finding that there has never been a genuine spousal relationship and a tribunal or delegate then be required, in applying the regulations, to consider amongst other things the issue of domestic violence which would only be a saving grace in circumstances where the genuine spousal relationship had already been established.*

145. It is noted that that extract from this Court’s decision in *Collins* was not followed by another Federal Magistrate in the matter of *Zaouk v Minister for Immigration & Anor* [2006] FMCA 1607 at [35]. However that decision was the subject of an appeal to a Full Court of the Federal Court and the appeal allowed. In *Minister for Immigration & Citizenship v Zaouk* [2007] FCAFC 47 where the Court relevantly stated the following:-

“14 The matter to be emphasised with all of the above six class of applicant is that, at the time of the application, the applicant is required to be (or but for death would have been) in a reg 1.15A spousal relationship with his or her sponsoring spouse. It is in this above context that the proper construction of subcl 820.211(8)(c) falls for determination (it is unnecessary to refer to subcl (9) which, for present purposes, is in identical terms).

15 Though the applicant is not referred to as such as “a spouse” in subpara (c), it is in our view tolerably clear that the relationship it contemplates as having existed but then having ceased is a reg 1.15A married relationship. That relationship clearly enough provides an essential foundation for the criteria for this subclass of visa. Ordinarily that relationship is required to exist at the time of the application for this visa: subcll (2), (3), (4), (5), (6). In the case of the death of the sponsoring spouse, the Minister is required to be satisfied that it would have continued to exist, but for that death: subcl (7). Then there is the exceptional case where that relationship has ceased but where nonetheless an application for this visa can be made. This is subclause (8). That exception is tied to the domestic violence requirement.

16 While the respondent has urged upon us the view that the incidence of domestic violence of itself provides the policy justification for the exception such that the “relationship” requirement should be construed beneficially to an applicant, we do not consider that the subpara can be so construed. Its context requires otherwise. It is evident from the provisions of Subclass 820 that the underlying policy (evident in the title of the subclass itself) is to tie the award of this visa to persons who are, or, exceptionally, who have been, in spousal relationships having the qualities identified in reg 1.15.”

146. Accordingly I see no reason to alter the view I expressed in *Collins* and further accept as submitted by the First Respondent that whilst theoretically in some cases the occurrence of domestic violence may show the state of the relationship earlier, this is only so applying the decision of *Bretag* when the evidence “tends logically to show the existence or non existence of facts relevant to the issue to be determined”. The claim of domestic violence in the present case in my view was not relevant in that sense.

147. Accordingly this ground should fail.

Ground 4

Applicant's submissions

148. It was submitted on behalf of the Applicant that the basis for holding that the domestic violence statutory declaration does not conform with the requirements of both subregulation 1.21(2) and 1.26(a) is that the Tribunal considered the Applicant was not a “competent person” within the meaning of subregulation 1.21(1)(a) set out earlier in this judgment.

149. It was submitted the Tribunal ignored relevant evidence and misapplied the subregulation. The declaration of Ms de Garcia which is the subject of this ground appears in the Court Book at p.135. In the declaration Ms de Garcia states next to the heading “Occupation” the following, “Ethnic Resource Supervisor – Womens Refugee Multicultural Service”.

150. Under the question, “What is the basis of your claim to be a ‘competent person’?” she relevantly declares,

“I have thirteen years experience working with victims of domestic violence. I have decision making responsibilities on case management”.

151. The Applicant submitted that having regard to those statements Ms de Garcia falls within the definition set out in regulation 1.21(2) being a manager of a “Womens Refuge”. It was further submitted she may be viewed as a manager with “decision making responsibility” for a womens refuge. Accordingly it is not necessary for the Applicant to invoke regulation 1.21(2)(b)(B) to further show that domestic violence service has a “collective decision making structure”. However, it was submitted since Ms de Garcia described herself as a “supervisor” and it is noted as a “welfare worker” in response to question 1 with “decision making responsibilities on case management” then a reasonable inference can be drawn that the service had a “collective decision making structure” if the Tribunal is not prepared to accept Ms de Garcia was of managerial or coordinator status under subregulation 1.21(2)(a).

152. Accordingly it was submitted that the Tribunal ignored relevant evidence of Ms de Garcia as a supervisor and as a welfare worker and that the organisation was a womens refuge. Hence, it was argued the Tribunal misapplied the subregulation in finding Ms de Garcia was not a “confident person” for this purpose. It thereby committed jurisdictional error.

153. In considering the submissions made by the Applicant it is relevant to set out the Tribunal’s reference to Ms de Garcia as follows,

“67. Ms de Garcia does not claim to be the manager or coordinator of a crisis or counselling service. In order to qualify as a competent person under regulation 1.21, she must therefore be the holder of a position with decision-making responsibility for a crisis and counselling service that has a collective decision-making structure. Ms de Garcia claims solely to have decision-making responsibilities for case management within her employing agency. She does not claim that the agency has a collective decision-making structure, and that she occupies a position which carries decision-making responsibility within the agency. Her statutory declaration therefore fails to meet the requirements of subregulations 1.21(2) and 1.26(a) of the Regulations.”

154. (Court Book p.469)

155. In the alternative the Applicant submitted that if the Tribunal had any doubts concerning the competency of Ms de Garcia then it should have clarified those doubts with the Applicant. It was argued that the Applicant’s representatives by letter dated 18 July 2004 (Court Book p.344) referred to the declarations provided to the Department in relation to the domestic violence provisions and relevantly stated,

“1. ... Please advise whether there will be any issue from the point of view of the tribunal as to whether these statutory declarations meet the prescribed requirements and are therefore validly accepted into evidence in terms of the legislation regulations and policy guidelines.”

156. Whilst conceding that the declarations are required to conform with the regulations it was argued this does not relieve the Tribunal of making an enquiry seeking clarification of cases referred to by the Tribunal in

paragraph 69 of its decision can be distinguished. That paragraph provides,

“69. The Tribunal notes that in Serfonteyn v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FMCA 333 and Bichar v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FMCA 360, Phipps FM held that the Tribunal is not under any obligation to highlight to an applicant that their statutory declarations in support of allegations of domestic violence do not satisfy the requirements of the Regulations.”

157. (Court Book p.469)

158. It was argued that in the decision of the Court in *Serfonteyn v Minister for Immigration* [2004] FMCA 333 the declarations were not provided at all. Reference was made to the Federal Court decision in *Du v Minister for Immigration and Multicultural and Indigenous Affairs* [2000] FCA 1115 where the non compliance with the declaration was fundamental in that it did not state that domestic violence had been suffered by the Applicant.

159. In support of the submission that there was a duty on the part of the Tribunal to at least notify the Applicant of its concerns in relation to the declaration by Ms de Garcia, the Applicant relied upon the decision of McHugh J in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 where the Court states at 121 the following:

“One of the fundamental rules of the fair hearing doctrine is that a decision maker should not make an adverse finding relevant to a person’s rights, interests or legitimate expectations unless the decision maker has informed that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided.”

160. If the Tribunal was not prepared to accept that a supervisor of the decision making responsibility was a “manager” or that a self styled “Womens Refuge Multicultural Service” was a “womens refuge” then it was submitted this ought to have been brought to the attention of the Applicant.

First Respondent's submissions

161. The First Respondent identified two aspects of this ground namely:
- whether the statutory declaration of Ms de Garcia met the requirements of regulation 1.26; and
 - whether there was a breach of s.359A in not giving notice to the Applicant that the declaration was deficient.
162. It was submitted that Ms de Garcia was required to be a competent person pursuant to the regulations and that her declaration should set out the basis of her claim to be a competent person.
163. It was argued that the Tribunal in its decision asked itself the right question when considering the declaration of Ms de Garcia and reached a factual conclusion which was correct. The declaration it was submitted did not describe Ms de Garcia as coming within any of the categories of regulation 1.21(1)(a)(i) to (iv). It was otherwise argued it did not set out the basis of her claim to be a competent person that she was a manager or coordinator of a womens refuge.
164. It was argued the term ‘manager’ means one who manages, one who is in charge with the management or direction of an institution, a business or the like or one who manages resources and expenditure as of a household. This is not synonymous with the meaning of ‘supervisor’ which it was submitted means “one who supervises; a superintendent” (see Macquarie Dictionary 3rd Edition for both definitions).
165. It was submitted that the declaration of Ms de Garcia simply describes her position as being one with the “Womens Refugees Multicultural Service” and not with a “womens refuge” or a “crisis and counselling service that specialises in domestic violence”. It was argued there was nothing in the declaration to show that Ms de Garcia’s position was with the womens refuge or a crisis or counselling service that specialises in domestic violence and that it has a collective decision making structure. It was further argued there was nothing to require the Tribunal to draw such an inference.
166. The Tribunal was not required by either the Act or any principles of natural justice to make a preliminary ruling on whether the evidence is

sufficient to enable the Applicant to change or add to the evidence to be presented. The Applicant was represented by solicitors who it was submitted could advise the Applicant on the requirements of the legislation and sufficiency of the evidence. It was argued the Tribunal did not mislead the Applicant.

167. It was further argued that it is irrelevant whether the Tribunal could have clarified doubts which it had. Regulation 1.26 of the Regulations requires a declaration to set out the necessary facts and these were not matters to be established by an inquiry according to the First Respondent's submissions.
168. It was further argued that there was nothing in the material to support any argument that there was a failure to comply s.359A and that the assessment by the Tribunal of the declaration was not information for the purpose of that section but rather was part of the Tribunal's subjective appraisal, thought process or determination (see *Rith Sok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1235 at [24] – [25] (Sok).
169. Particular emphasis was placed upon the task of the Tribunal in determining whether the application included a “non judicially determined claim of domestic violence” within the terms of regulation 1.23(1)(B). The Tribunal was required to determine whether in accordance with regulation 1.26 a declaration was sufficient. It was noted that regulation 1.26(b) provides that the declaration “must set out the basis of [her] claim to be a competent person for the purposes of this division”. It was submitted the declaration did not comply even after making allowance for the answers given set out earlier in this decision by Ms de Garcia in her declaration.

Reasoning

170. In my view the Tribunal has correctly identified its task in relation to determining whether the declaration was provided by a competent person.
171. I can see no error in the manner in which the Tribunal has approached its task. Whilst inferences may be drawn from the answers given in the declaration that does not relieve the Applicant and/or her advisers from

complying with the requirements of the Regulations. It is as submitted by the First Respondent the Tribunal's task to determine whether or not the declaration was sufficient and in doing so it has to be satisfied that it complies with the Regulations. I accept that it is not a matter for the Tribunal to then make further enquiries and undertake a hearing to determine whether inferences may or may not be properly drawn from the declaration. It is the responsibility of the Applicant and/or her advisers to ensure that the declaration complies with the Regulations. The requirements are clear.

172. I accept the submissions of the First Respondent that the terms "supervisor" and "manager" are not synonymous and accordingly the information provided in the declaration by Ms de Garcia does not for the reasons advanced by the First Respondent comply with the requirements of the Regulations.
173. Accordingly this ground should fail. To the extent that it is argued I should also add that I am not satisfied in the circumstances that the Tribunal's misgivings about the adequacy of the declaration provide any or proper basis upon which the Tribunal should discharge obligations pursuant to s.359A of the Migration Act. Whilst it may well be desirable and courteous to respond in particular to the request in the letter dated 18 July 2005 that does not of itself create a legal obligation. If legal obligations were imposed on Tribunals as a consequence of invitations set out in correspondence which go beyond the statutory obligations including obligations under s.359A of the Migration Act then that would unnecessarily introduce what I consider to be a significant burden on Tribunals to ensure that where misgivings or doubts arise in the mind of the Tribunal that it should somehow be required to give preliminary indications of those doubts or misgivings. I accept that that is not the statutory responsibility of the Tribunal as to do so would be contrary to the authority of the Court in *Sok* and would require the Tribunal to reveal its subjective appraisals, thought processes or determinations.
174. As indicated accordingly this ground fails.

Ground 5

Applicant's submissions

175. It was submitted by the Applicant that procedural unfairness arises in two ways. It was submitted that first the Tribunal had stated that it would give Mr Ngo an opportunity to meet the accusations made against him and the Applicant and then failed to do so either through the Applicant herself or directly. Secondly, it was submitted that “when the Applicant’s solicitors sought various documents identified in a chronology prepared by the Tribunal case officer be made available under the Freedom of Information application certain documents were withheld from production under s.375A of the Migration Act without advising the Applicant of the substance of the documents so the Applicant could have an opportunity to respond”.

176. It is relevant to set out extracts from the Tribunal’s decision where reference is made to Mr Ngo as follows:-

“28. She divorced the nominator on 10 February 2003 and married Mr Ngo on 17 April 2003. Asked to explain the development of her relationship with Mr Ngo, the visa applicant said that had seen him in 2000, while visiting his mother in Queensland. His mother had been a friend of her mother in Vietnam, and Mr Ngo was working in Bundaberg during the week, and staying with his mother on weekends. She claimed that she did not speak with him until the end of 2000, when she met him again in WA. The review applicant subsequently gave birth to a child, whose registration entry shows Mr Ngo as the father.

29. Mr Ngo said that he met the review applicant in mid-July 2000 after returning from Vietnam, where he had celebrated his engagement to another woman. He worked in Bundaberg and spent weekends with his mother and sister in Inala, Queensland. At the end of the season, he stayed with his mother, and came to know the review applicant, and learned of her relationship difficulties. In September 2000, after he went to WA, he decided to call off his engagement to his fiancée.

30. Mr Ngo said that he disputed recent accusations that he had threatened other people as well as other allegations made

against him. The Tribunal indicated that it would seek his comments under s359A of the Act on any adverse material, and would not it at face value.”

177. (Court Book p.455)

178. Reference was also made to the allegations concerning Mr Ngo and in particular the transcript which is Annexure DP 2 to the Applicant’s affidavit sworn 31 March 2006 which relevantly includes the following:-

“MR YOUNG: Thank you, Mr Ngo. Well, what I will be doing, in fact, is sending or relaying those allegations and claims under what we call section 359A of our Act to you through your solicitor there, and inviting comments on them. So you have an opportunity to – you and your wife, of course, have an opportunity to comment on them. And I would, of course, be taking those into account when making a decision. So you can be assured that we don’t simply takes these things at face value.”

179. It was argued that the Tribunal in that passage clearly addressed Mr Ngo and the Applicant in relation to the allegations concerning Mr Ngo.
180. The s.359A letter though enclosing a number of documents considered relevant to the issue of the genuineness of the relationship did not contain any material relating to Mr Ngo’s alleged conduct. It was argued the Tribunal had by its statements clearly considered the evidence relevant and could possibly be credible.
181. Reference was made to the decision in *Applicant VEAL of 2002 v MIMA* [2005] HCA 72 (6 December 2005) (VEAL) where the Court held that it was procedurally unfair for a Tribunal to fail to provide the substance of allegations in relation to a letter received by it notwithstanding the Tribunal had claimed in its findings that it gave no weight to a letter sent to the Department. In the present case it was submitted the Tribunal did not say in its reasons whether it gave any weight to the material but its comments during the hearing it was submitted indicated it considered the material relevant.
182. It was argued that there is a duty upon the Tribunal in relation to documents sought by the Applicant’s solicitors to satisfy itself in

respect of those documents which were being held from production under s.375A of the Migration Act as to whether those documents were “credible, relevant and significant”.

183. It is perhaps useful to set out s.375A of the Migration Act which provides as follows:-

“(1) This section applies to a document or information if the Minister:

(a) has certified, in writing, that the disclosure, otherwise than to the Tribunal, of any matter contained in the document, or of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 375(a) or (b)); and

(b) has included in the certificate a statement that the document or information must only be disclosed to the Tribunal.

(2) If, pursuant to a requirement of or under this Act, the Secretary gives to the Tribunal a document or information to which this section applies:

(a) the Secretary must notify the Tribunal in writing that this section applies to the document or information; and

(b) the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the particular review.”

184. It was argued that procedural unfairness and jurisdictional error arises out of the Tribunal’s failure to invite the Applicant and Mr Ngo to respond under the s.359A letter to the allegations made against Mr Ngo and/or in failing to address the significance and credibility of documents withheld pursuant to s.375A of the Migration Act.

185. By way of response to submissions made by the First Respondent, the Applicant accepted there may be no obligation to put matters to the Applicant in relation to the documents for which certificates had been granted under s.375A. It was argued however pursuant to s.362A subject only to s.375A and 376 the Applicant is entitled to have access to any written material or a copy of any written material given or

produced to the Tribunal for the purpose of review. It was submitted that did not occur. Reference is made to what is claimed to be a direction from the Tribunal for the release of documents other than those covered by s.375A certificate (see affidavit of Huynh Anh Ngo sworn 1 August 2006 (Exhibit A4 – Annexure HAN-2)).

186. The Applicant submitted that the failure of the Tribunal to give the Applicant an opportunity to comment upon threats claimed to have been made by Mr Ngo and the Applicant or failure to furnish documentation in possession of the Tribunal save and accept for documents subject to the s.375A certificate constituted jurisdictional error.

First Respondent's submissions

187. The First Respondent submitted that essentially this ground seeks to assert a denial of procedural fairness. It was submitted however that there is no reference to any particular provision of the Migration Act claimed to have been breached by the Tribunal. Reliance was placed upon s.357A of the Migration Act which it was submitted provides “an exhaustive statement of the fair hearing requirements of procedural fairness”.
188. It was submitted that no breach of natural justice occurred arising out of the Tribunal's claim that it would give an opportunity to Mr Ngo to respond to the allegations as there is no practical unfairness. In the present case the significant issue for the Tribunal it was argued was whether the Applicant and Mr Burton were in a married relationship. Mr Ngo's conduct was not relevant to that issue. No finding was made against the Applicant in relation to any factual issue arising from the allegations concerning Mr Ngo. There was no therefore no practical unfairness (see *Minister for Immigration and Multicultural and Indigenous Affairs Ex parte Lamb* (2003) 214 CLR 1).
189. It was noted that the Applicant's reliance upon the Court's decision in *VEAL* does not assist as that case was not governed by the procedural fairness amendments which include relevantly s.357A which was introduced in 2002. Further, it was argued that in any event the

allegations concerning Mr Ngo were not relevant to the decision made by the Tribunal in the present case.

Reasoning

190. In my view the significant submission made by the First Respondent that there is no practical injustice is clearly correct. Whilst it may be understandable that Mr Ngo felt deprived of the opportunity of answering significant allegations, that does not detract from the fact that in this instance the Tribunal's main task was to determine the spousal relationship between the Applicant and Mr Burton.
191. I accept the submissions of the First Respondent that the decision of the Court in *VEAL* does not assist the Applicant and further accept that s.357A applies to this application.
192. I do not accept that there has been any evidence of procedural unfairness even though I acknowledge that the comment by the Tribunal in its decision that it indicated it would seek to make reference to the allegations against Mr Ngo in its s.359A letter and failed to do so would be a cause of concern. However, the Tribunal did not then proceed to have regard to that material in reaching its decision on the crucial issue before it namely assessment of the relationship between the Applicant and Mr Burton.
193. It follows that this ground should fail.

Conclusion

194. It will be apparent that I have considered each of the grounds even though it is probably unnecessary to do so having regard to my significant finding arising out of the first ground. I have done so however out of an abundance of caution. The significant finding however in relation to ground 1 of itself is sufficient to be dispositive of this application for judicial review and it is appropriate that orders be made accordingly, that the decision be set aside and the matter remitted to a differently constituted Tribunal to be determined according to law including obviously consideration of the relevant witness statements.

195. I should add that after the hearing both parties sought to make submissions in relation to the High Court decision in *SZBEL*. That decision it was submitted by the Applicant was relevant in support of paragraphs 4.4 and 4.5 of the Applicant's Amended Application. It was submitted by the Applicant in correspondence dated 15 January 2007 that "even if the statutory declaration of Ms de Garcia was deficient ... the Tribunal ought to have given the Applicant an opportunity to comment upon the statutory declaration especially as a migration agent had invited the Tribunal to do so if there was any perceived deficiency in it". It was submitted that, "in the light of the decision of *SZBEL* 'what the Tribunal says at paragraph 69 set out earlier in this judgment' and the case law to which the Tribunal there refers the Tribunal did have an obligation to put its reservations about Ms de Garcia's statutory declaration to the Applicant".
196. The First Respondent submitted and I accept that the decision of the Court in *SZBEL* "requires consideration of the issues arising in relation to the decision under review". In that case it was submitted that "the Court found a breach of natural justice when the Tribunal determined the review application on an issue of credibility which did not arise in the decision of the delegate, and where the Applicant would have been entitled to assume that the issue of credibility did not arise on the review". It was submitted that that is "very different from the situation in this case". For reasons which appear in my consideration of ground 4 I accept the submission of the First Respondent and in my view the decision of the High Court in *SZBEL* is not relevant to the present application where the Tribunal was considering whether the declaration relied upon had been provided by a competent person pursuant to the Regulations. I have already provided my reasoning in relation to that issue and do not see any reason to alter that reasoning in the light of *SZBEL*.

I certify that the preceding one hundred and eighty-seven (187) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 31 May 2007